No. 83-5596

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH ROBERT SPAZIANO, PETITIONER

vs.

STATE OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

RICHARD L. JORANDBY
Public Defender
224 Datura Street/
13th Floor
West Palm Beach,
Florida 33401

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Chief Assistant Public Defender

Counsel for Petitioner

JIM SMITH
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MARK C. MENSER
Assistant Attorney General
125 North Ridgewood Avenue
4th Floor
DAYTONA BEACH,
FLORIDA 32014
Counsel for Respondent

Petition For Certiorari Filed October 11, 1983.
Certiorari Granted January 9, 1984.

INDEX TO JOINT APPENDIX

CHRONOLOGICAL LIST OF IMPORTANT DATES

Document/Activity	Date
Offense, alleged date	Between August 4, and August 22, 1973
Indictment, first degree murder	September 12, 1975
Capias for Arrest	September 12, 1975
Jury trial commences	January 20, 1976
Verdict, guilty as charged	January 23, 1976
Capital penalty trial	January 26, 1976
Advisory jury verdict of life	January 26, 1976
Judgment of conviction Sentence of Death	July 16, 1976
Opinion of the Supreme Court of Florida, affirming conviction and remanding sentence for violation of *Gardner* v. *Florida*	January 8, 1981
Denial of rehearing	March 6, 1981
Sentencing hearing in the trial court	May 28, 1981
Petition for a writ of certiorari docketed in this Court (No. 80-6785)	June 2, 1981
Sentence of death reimposed	June 4, 1981
Order of this Court, denying petition for a writ of certiorari	November 9, 1981
Order of this Court, denying petition for rehearing	January 11, 1981
Opinion of the Supreme Court of Florida affirming the sentence of death	May 26, 1983
Order denying rehearing	July 13, 1983
Order granting the petition for a writ of certiorari	January 9, 1984

No. K-75-430-CFA

IN CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA
SEMINOLE COUNTY

THE STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO
A/K/A
CRAZY JOE

INDICTMENT FOR
FIRST DEGREE MURDER

Found Spring Term A.D. 1975.

/S/ RUTH DENTON
Foreman of the Grand Jury

Presented in Open Court and Filed this 12th day of September, 1975

/S/
ARTHUR H. BECKWITH, JR.
Clerk

BY:/s/
CLAUDIA HUGHEY

STATE WITNESSES

George Abbgy
Ralph Dilisio
Anthony DiLisio
Henrietta Young

[INDICTMENT; FILED SEPTEMBER 12, 1975]

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE Eighteenth Judicial Circuit of the State of Florida for Seminole County, at the Spring Term thereof, in the year of our Lord One Thousand Nine Hundred and Seventy-Five, Seminole County, to-wit: The Grand Jurors of the State of Florida; inquiring in and for the body of the County of Seminole, upon their oaths do charge that in Seminole County, Florida, on or about August 6th, 1973, JOSEPH ROBERT SPAZIANO a/k/a CRAZY JOE, did unlawfully kill a human being, LAURA LYNN HARBERTS, and said killing was perpetrated by said JOSEPH ROBERT SPAZIANO a/k/a CRAZY JOE, from a premeditated design or intent to effect the death of said LAURA LYNN HARBERTS, contrary to Section 782.04(1)(a), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/ _____
Foreman of the Grand Jury

A TRUE BILL

I hereby certify that I have, as authorized and required by law, advised the Grand Jury returning the foregoing indictment.

/s/ _____
State Attorney

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT OF
STATE OF FLORIDA IN AND
FOR SEMINOLE COUNTY

CASE NO. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

VERDICT OF THE JURY

[Filed January 26, 1976]

We, The Jury, find the Defendant Joseph Robert Spaziano Guilty of Murder In The First Degree, Section 782.04(1)(a), Florida Statutes

So say we all.

/s/ _____
Foreman

Date: January 23, 1976

Filed in Open Court this 23rd day of January, 1976, by Mona Lee, *Trial Clerk*

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT OF
STATE OF FLORIDA IN AND
FOR SEMINOLE COUNTY

CASE NO. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

VERDICT OF THE JURY

[Unused; Filed January 26, 1976]

We, The Jury, find the Defendant Joseph Robert Spaziano Not Guilty.

So say we all.

/s/ _____
Foreman

Date: _____

Filed in Open Court this ____ day of _____,

By _____
Trial Clerk

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT OF
STATE OF FLORIDA IN AND
FOR SEMINOLE COUNTY

INDICTMENT No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

ADVISORY SENTENCE OF THE JURY

[Filed January 27, 1976]

A majority of the jury advise and recommend to the court that it impose a sentence of life imprisonment upon the defendant, Joseph Robert Spaziano.

/s/ _____
Foreman

Date: January 26, 1976

Filed in Open Court this 26th day of January, 1976, by Mona Lee, *Trial Clerk*

IN THE CIRCUIT COURT
EIGHTEEN JUDICIAL CIRCUIT OF
STATE OF FLORIDA IN AND
FOR SEMINOLE COUNTY

INDICTMENT No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

ADVISORY SENTENCE OF THE JURY

[Unused, January 27, 1976]

A majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, *Joseph Robert Spaziano.*

/s/ _____
Foreman

Date: _____

Filed in Open Court this ____ day of _____, 1976,

by _____
Trial Clerk

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT, OF FLORIDA

CRIMINAL DIVISION
CASE NO. 75-430-CFA

STATE OF FLORIDA,

v.

JOSEPH ROBERT SPAZIANO A-K-A CRAZY JOE,
DEFENDANT

JUDGMENT OF CONVICTION
and
IMPOSITION OF SENTENCE
(Rule 3.670, 3.700—Sec. 921.141, F.S.
cap. fel.-verdict-PSI-death)
[Filed July 19, 1976]

The above-named defendant appeared with his counsel to stand trial on the charges in the indictment herein, and a jury of twelve good, lawful and qualified electors of this county were duly selected, empanelled and sworn to well and truly try the issues and render a true verdict according to the law and evidence, the taking of testimony was commenced and concluded and after hearing argument of counsel and instructions as to the law, the jury retired, deliberated, returned and rendered a unanimous verdict finding the defendant guilty and the court conducted, as provided in Section 921.141(1), F.S., a separate sentencing proceeding before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment wherein evidence was presented to matters relevant to sentence including matters relating to the aggravating and mitigating circumstances as specified in Section 921.141(5) and (6), F.S. and the State and the defendant and his counsel were permitted to present argument for and against the

sentence of death and, thereupon, the jury again deliberated and rendered an advisory sentence to the court wherein a majority of the jury recommended that the defendant should be sentenced to life imprisonment; thereafter the court ordered a Presentence Investigation and considered it as well as the facts heard during the trial and during the separate sentencing proceeding and itself weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of the jury, found that sufficient aggravating circumstances existed to justify and authorize a death sentence and that the mitigating circumstances were insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. The court makes the following findings of fact upon which the sentence of death is based:

1. The homocide committed by the defendant was especially heinous and atrocious. The victim was not only murdered; she was also mutilated in a very gross manner. Her breasts were cut off and her vagina was cut out. The defendant when asked by a friend as to why he did it that way, stated "Man, that's my style." This crime appears to this court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." See Dixon *v.* State, 283 So. 2d 1, 9.

2. The defendant was previously convicted of felonies involving the use or threat of violence to the person. Prior to this trial, viz, on August 13, 1975, the defendant was sentenced to life imprisonment for a violent sex crime that occurred on February 9, 1974. He was also sentenced to a consecutive five years for aggravated battery arising out of the same incident. The details of this incident are referred to some detail at page 1A of the Confidential Evaluation section of the Presentence Investigation Report which, because of its confidential nature, is sealed and attached only to the original and first certified copy (Governor's copy) hereof as Exhibit A. In addition, the defendant's prior conviction record as set out on pages two and three of the Presentence Investigation Report shows a conviction in New York State for 3rd Degree Assault, on August 9, 1963, and a forfeited bail on another such charge on Octo-

ber 20, 1963. Incidentally this same record shows that the defendant was twice placed on probation and in each case the probation was subsequently revoked.

3. This court has considered the other statutory categories of aggravating circumstances and finds them inapplicable because either there is no evidence to bring them into focus or the evidence so circumstantial that it does support a conclusive inference; for example, it *might* be inferred from a totality of circumstances that the defendant was engaged in the commission of, or an attempt to commit rape and/or kidnaping and that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

4. This court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation to give rise to any such mitigating circumstances except, perhaps, the age of the defendant. The defendant was born September 12, 1945. On the date of victim's death, August 6, 1973, he would have been nearly twenty-eight years of age. (The victim was eighteen years of age). This is not such youthfulness as would outweigh the aggravating circumstances found to exist particularly when viewed in the light of a criminal history beginning when the defendant was eighteen years of age.

and thereafter,

JUDGMENT was rendered in open court and entered on the minutes of the court that said defendant was adjudged guilty and convicted of Murder In The First Degree, (Section 782.04(1)(a), F.S.); and the court informed the defendant of the accusation against him and of the judgment and of his right of allocution and he showed no cause authorized by law why sentence should not be pronounced and imposed upon him, he was

SENTENCED to be put to death in the manner and means provided by law (Section 922.10, F.S.). The court informed the defendant of his right to appeal from this judgment and sentence.

DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:

The clerk of this court shall file and record this judgment and sentence and seal its attachment and shall prepare four certified copies of this record of conviction and sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Offender Rehabilitations to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings and instructions of the court both in the original trial, and the separate sentencing proceedings and at the time of adjudication and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4), F.S.), the Clerk of this court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S. and F.A.R. Rule 6.9 e.) and two copies thereof and, after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon the Attorney General of the State of Florida and one copy thereof upon counsel for the defendant on appeal. After the Clerk has filed a transcript of record on appeal with the Appellate

Court, counsel for the defendant on appeal shall file his brief within the time provided in F.A.R. Rule 6.11 b. The Clerk of this court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 16th day of July, 1976.

/s/ _____

ROBERT B. MCGREGOR
Circuit Judge

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT, OF FLORIDA

CRIMINAL DIVISION
CASE NO. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO
A-K-A CRAZY JOE, DEFENDANT

AMENDED JUDGMENT of conviction and imposition of SENTENCE (Rule 3.670, 3.700—Sec. 921.141, F.S. cap. fel.—verdict—PSI—death)
[Filed July 29, 1976]

The above-named defendant appeared with his counsel to stand trial on the charges in the indictment herein, and a jury of twelve good, lawful and qualified electors of this county were duly selected, empanelled and sworn to well and truly try the issues and render a true verdict according to the law and evidence, the taking of testimony was commenced and concluded and after hearing argument of counsel and instructions as to the law, the jury retired, deliberated, returned and rendered a unanimous verdict finding the defendant guilty and the court conducted, as provided in Section 921.141(1), F.S., a separate sentencing proceeding before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment wherein evidence was presented to matters relevant to sentence including matters relating to the aggravating and mitigating circumstances as specified in Section 921.141(5) and (6), F.S. and the State and the defendant and his counsel were permitted to present argument for and against the sentence of death and, thereupon, the jury again deliberated and rendered an advisory sentence to the court where-

in a majority of the jury recommended that the defendant should be sentenced to life imprisonment; thereafter the court ordered a Presentence Investigation and considered it as well as the facts heard during the trial and during the separate sentencing proceeding and itself weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of the jury, found that sufficient aggravating circumstances existed to justify and authorize a death sentence and that the mitigating circumstances were insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. The court makes the following findings of fact upon which the sentence of death is based:

1. The homicide committed by the defendant was especially heinous and atrocious. The victim was not only murdered; she was also mutilated in a very gross manner. Her breasts were cut off and her vagina was cut out. The defendant when asked by a friend as to why he did it that way, stated "Man, that's my style." This crime appears to this court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." See Dixon v. State, 283 So. 2d 1, 9.

2. The defendant was previously convicted of felonies involving the use or threat of violence to the person. Prior to this trial, viz, on August 13, 1975, the defendant was sentenced to life imprisonment for a violent sex crime that occurred on February 9, 1974. He was also sentenced to a consecutive five years for aggravated battery arising out of the same incident. The details of this incident are referred to some detail at page 1A of the Confidential Evaluation section of the Presentence Investigation Report which, because of its confidential nature, is sealed and attached only to the original and first certified copy (Governor's copy) hereof as Exhibit A. In addition, the defendant's prior conviction record as set out on pages two and three of the Presentence Investigation Report shows a conviction in New York State for 3rd Degree Assault, on August 9, 1963, and a forfeited bail on another such charge on October 20, 1963. Incidentally this same record shows that the

defendant was twice placed on probation and in each case the probation was subsequently revoked.

3. This court has considered the other statutory categories of aggravating circumstances and finds them inapplicable because either there is no evidence to bring them into focus or the evidence so circumstantial that it does not support a conclusive inference; for example, it *might* be inferred from a totality of circumstances that the defendant was engaged in the commission of, or an attempt to commit, rape and/or kidnapping and that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

4. This court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation to give rise to any such mitigating circumstances except, perhaps, the age of the defendant. The defendant ws born September 12, 1945. On the date of victim's death, August 6, 1973, he would have been nearly twenty-eight years of age. (The victim was eighteen). This is not such youthfulness as would outweigh the aggravating circumstances found to exist particularly when viewed in the light of a criminal history beginning when the defendant was eighteen years of age.
and thereafter,

JUDGMENT was rendered in open court and entered on the minutes of the court that said defendant was adjudged guilty and convicted of Murder In The First Degree, (Section 782.04(1)(a), F.S.); and the court informed the defendant of the accusation against him and of the judgment and of his right of allocution and he showed no cause authorized by law why sentence should not be pronounced and imposed upon him, he was

SENTENCED to be put to death in the manner and means provided by law (Section 922.10, F.S.). The court informed the defendant of his right to appeal from this judgment and sentence.

DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:

The Clerk of this court shall file and record this judgment and sentence and seal its attachment and shall prepare four certified copies of this record of conviction and sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Offender Rehabilitations to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings and instructions of the court both in the original trial, and the separate sentencing proceedings and at the time of adjudication and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4)/F.S.) the Clerk of this court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S. and F.A.R. Rule 6.9 e.) and two copies thereof and, after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon counsel for the defendant on appeal. After the Clerk has filed a transcript of record on appeal with the Appellate Court, counsel for the defendant on appeal shall file his brief within the

time provided in F.A.R. Rule 6.11 b. The Clerk of this court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 29th day of July, 1976, NUNC PRO TUNC the 16th day of July, 1976.

/S/ _____

ROBERT B. MCGREGOR,
Circuit Judge

SUPREME COURT OF FLORIDA

No. 50250

JOSEPH ROBERT SPAZIANO A/K/A
CRAZY JOE, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE

Jan. 8, 1981

PER CURIAM.

This is a direct appeal from the imposition of a death sentence after the appellant had been convicted of first-degree murder. After receiving a jury recommendation of a life sentence for the murder conviction, the trial judge imposed the sentence of death. For the reasons expressed, we affirm the conviction but find we must remand for resentencing because the trial judge relied in part on information not available to the jury or the defendant in imposing the death sentence, contrary to *Gardner* v. *Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and also relied upon nonstatutory aggravating factors, in violation of section 921.141, Florida Statutes.

The material facts reflect that the skeletal remains of two bodies were discovered at the Altamonte city dump. One body was positively identified through the use of dental records as that of Laura Harberts. The appellant, Robert Spaziano, was charged with the murder of Harberts, and the principal witness for the state was Ralph Dilisio, a sixteen-year-old acquaintance of the appellant. Dilisio testified that Spaziano often bragged about the girls he had mutilated and killed, and on the occasion Dilisio and another individual accompanied the appellant to the Altamonte dump site where Dilisio saw two corpses, both covered with blood. Dilisio stated that Spaziano claimed responsibility

for these killings; one of the corpses was determined at trial to have been Laura Harberts.

The appellant attacked Dilisio's testimony as being unreliable because at the time he viewed the corpses, Dilisio had been taking numerous types of drugs on a regular basis for at least a year. Defense counsel challenged the sufficiency of Dilisio's recall and perception abilities because of the drug habit, although Dilisio testified that on the particular day of the sighting he had not taken any drugs. Dilisio was able to successfully direct the police to the site where the corpse of Laura Harberts was found.

After receiving its instructions, the jury began its deliberations at 4:39 p.m. and at approximately 8:30 p.m. the court sent the jury to dinner. Upon its return, the following colloquy took place between the trial judge and the jury foreman:

> THE COURT: Mr. Pascual, as foreman, the Court would inquire of you if you think that if given more time, there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so?
>
> MR. PASCUAL: Your Honor, I don't know if I can say that there will be reasonable probability, but I think I can speak for the entire jury that I believe we would like to spend some more time. We don't feel, I don't believe, that we're at the point where we are at an impasse that cannot be overcome.

The jury then continued to deliberate until 10:26 p.m., at which time the jury was brought back and, in response to an inquiry from the judge as to whether or not they would be able to reach a verdict, the foreman replied: "At this point, Your Honor, I don't believe so." The trial court then proceeded to instruct the jury by using standard jury instruction 2.19 in effect at the time of the trial, which read as follows:

> Ladies and gentlemen, it is your duty to agree upon a verdict if you can do so without violating conscientiously held convictions that are based on the evidence or lack of evidence. No juror, from mere pride or opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of termi-

> nating a case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and that this case may be disposed of. [Now renumbered as 2.21.]

The jury resumed their deliberations and approximately thirty minutes later, shortly after 11:00 p.m., they returned a verdict of guilty.

At the conclusion of the sentencing phase of the trial, the jury recommended that the defendant receive a sentence of life imprisonment. The trial court ordered a presentence investigation. In his sentencing order, the judge stated that he considered the presentence investigation report as well as the facts heard during the trial, and found that sufficient aggravating circumstances existed to justify the death sentence. The trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and, secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person. The trial judge based the second finding upon convictions listed in the presentence investigation report, including two convictions discussed in a confidential section of the report. Finally, the trial court found that the other statutory categories of aggravating circumstances were inapplicable, and that there were no mitigating circumstances.

Pursuant to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), after notice of appeal was filed we directed the trial judge to disclose any information he may have used in sentencing that was not disclosed to the defendant. In his response, the trial judge advised this Court that neither party received copies of the confidential portion of the presentence investigation report, nor did they receive the personality inventory report that was attached to it. The trial judge did, in fact, use this information in imposing this death sentence.

Trial Phase

The appellant asserts as grounds for error in the trial phase that: (a) the evidence was insufficient to support the jury's verdict; (b) the trial court erred in its instructions to the jury concerning their responsibilities, and in giving the approved standard jury instruction after an apparent deadlock; (c) the prosecutor's summation was inflammatory and prejudicial; (d) the trial court improperly limited cross-examination of a prosecution witness; and (e) the trial court improperly denied appellant's request for a jury view of the scene.

With reference to the contention that the evidence is insufficient, the appellant asks us to reject in totality the testimony of Dilisio. Dilisio led the authorities to the dump where the bodies were found two years after he observed them with the appellant. Both the jury and the trial judge had a superior vantage point to weigh the credibility of Dilisio's testimony. We find the evidence in this record was sufficient to sustain this jury's verdict.

The contention that the trial judge made improper comments during a colloquy with the jury foreman concerning the status of jury deliberations, and the assertion by the appellant that our standard jury instruction for a deadlocked jury is improper, are both without merit. The colloquy was clearly reasonable and proper, and we find that our standard jury instruction, presently standard 2.21, is fair, unbiased and has been specifically approved by this Court in *State v. Bryan*, 290 So.2d 482 (Fla. 1974). In addition, such a charge has also been approved by the Fifth Circuit Court of Appeals. *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978); *United States v. Solomon*, 565 F.2d 364 (5th Cir. 1978); *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973).

The contention that the prosecutor's comments were inflammatory and prejudicial, that the trial court improperly limited cross-examination, and that the trial court improperly denied a jury view, are clearly without merit and do not warrant discussion.

By Notice of Supplemental Authority, Spaziano raises the argument that the state may not under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), force him to choose between waiving the statute of limitations which had run as to all lesser included non-capital offenses and having the jury instructed only as to first-degree murder. The *Beck v. Alabama* decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of *Beck v. Alabama* may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

Sentencing Phase

The trial judge considered a confidential portion of the presentence investigation report which contained information that the appellant had been a suspect in four homicides and three bombings, was a member of the "Outlaws" gang, had been convicted of rape and sentenced to the state prison, had been charged with forcible carnal knowledge, rape, and false imprisonment for another incident, but allegedly escaped prosecution because of harassment and threats towards the victim by gang members, and had been convicted of other nonviolent felony and misdemeanor offenses.

In *Gardner v. Florida*, decided after the trial and sentence in this cause, the United States Supreme Court held that a defendant in a death case is denied due process of law when the death sentence is imposed, even in part, on the basis of information that he had no opportunity to deny or explain. The *Gardner* decision prohibits the judge's use of this confidential information in the presentence investigation report without first disclosing that information to Spaziano and providing an opportunity to present evidence in response. Under the standards set down in *Gardner*, we must find clear error in the use of the confidential portion of the presentence investigative report.

Section 921.141(5), Florida Statutes, limits the factors in aggravation which may be considered by the trial judge in imposing the death sentence. In considering a defendant's prior criminal record, the trial judge is limited to only those offenses for which "the defendant was previously convicted." *Provence v. State*, 337 So.2d 783 (Fla.1976). Further, these underlying convictions are also limited to "another capital felony or . . . felony involving the use or threat of violence to the person." § 921.141(5)(b), Fla.Stat. The prior felony offenses involving violence for which the appellant in this case was convicted are proper factors to be considered in aggravation. However, the convictions for nonviolent offenses and misdemeanors and charges for which there was no conviction must be excluded as aggravating factors.

In conclusion, we find the *Gardner* violation and the statutory limiting factors in aggravation require this cause to be remanded to the trial judge for resentencing.

We affirm the conviction and remand for resentencing by the trial judge in accordance with the views expressed in this opinion.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUPREME COURT OF FLORIDA

CASE NO. 50,250
Circuit Court No. 75-430-CFA
(Seminole)

JOSEPH ROBERT SPAZIANO,
APPELLANT

v.

STATE OF FLORIDA,
APPELLEE

Upon consideration of the Motion for Rehearing filed in the above cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur.

SUNDBERG, C.J. and ENGLAND, J., would grant Motion for Rehearing for purposes of receiving briefs and argument on the *Beck* issue

JURAT OMITTED IN PRINTING

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NO. 75-430-CFA

STATE OF FLORIDA,
PLAINTIFF

v.

JOSEPH ROBERT SPAZIANO A/K/A
"CRAZY JOE", DEFENDANT

IMPOSITION OF SENTENCE AFTER REMAND
[Filed June 16, 1981]

This cause has been remanded to this Trial Court for resentencing by opinion and mandate of the Supreme Court of Florida, (see Spaziano *v.* State, 393 So2d 1119) which remand was for the purpose of conducting a sentencing proceeding in light of the principles enunciated in Gardner *v.* Florida, 430 U.S. 349. Upon receipt of the mandate, this court vacated the sentence earlier imposed, ordered a new Presentence Investigation Report, and scheduled a hearing for the purpose of affording the Defendant an opportunity to present evidence in response to such Presentence Investigation Report. Prior to the hearing both the Defendant and State filed certain motions which were duly ruled upon as the record will reflect. The Defendant upon this Court's order had been returned to the Seminole County Jail from the Department of Corrections and was present before the Court with counsel for the hearing on the motions and at all subsequent hearings. Copies of the PSI Report were given to counsel for the Defendant and State on May 21, 1981. On May 28, 1981 a hearing was held at which time the State offered evidence of a prior conviction of a felony involving the use of violence to the person. The Court received in evi-

dence the judgment of such conviction as well as a transcript of testimony of the victim in the trial leading to such prior conviction. The Defendant was then offered the opportunity to present any evidence he might have and to respond to the PSI Report. The Defendant declined to present any evidence or otherwise respond to the PSI Report; however, counsel for the Defendant presented arguments on his behalf. Counsel for the State presented arguments on behalf of the State. This Court then took the matter of sentence under advisement and scheduled a hearing for imposition of sentence on June 4, 1981.

On June 4, 1981, the Defendant appeared with counsel and was informed by this Court of the accusation against him and of the judgment and of his right of allocution. The Defendant showed no cause authorized by law why sentence should not be pronounced and imposed upon him.

This Court in reaching its sentence has considered the facts heard during the trial and during the separate sentencing proceeding, the evidence of prior conviction presented by the State on May 28, 1981, the new PSI Report (other than portions stricken, see record of hearing held May 28, 1981), has carefully considered the arguments presented by counsel, and has weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of jury, finds that sufficient aggravating circumstances exist to justify the death sentence and that the mitigating circumstances are insufficient to out weigh such aggravating circumstances and that a sentence of death should be imposed in this case. The Court makes the following findings of fact upon which the sentence of death is based:

There exists in this case two aggravating circumstances as contemplated by Section 921.141(5), Florida Statutes, viz. subsections (5)(b) and (5)(h).

In respect to subsection (5)(b), the State during this resentencing procedure presented evidence of the Defendant's prior convictions in the Circuit Court of Orange County, Florida, Case No. CR 75-1305 wherein the Defendant was convicted upon jury verdicts of the crimes of forcible carnal knowledge, a violation of Section 794.01, F.S., 1973

and aggravated battery, a violation of Section 784.045, F.S., 1973. These crimes were committed on the 9th day of February, 1974, and the jury returned its verdicts on August 13, 1975. In the case before this Court the homicide was committed in August, 1973, but the Defendant was not brought to trial until January, 1976; however, the conviction predates the conviction in this case and consequently comes within the terminology of subsection (5) (b), viz, "The defendant was previously convicted of . . . a felony involving the use . . . of violence to the person." In the criminal episode in Orange County it appears that the victim was sexually battered and then stabbed with a knife a number of times about the neck and head. During the sentencing portion of the trial in this case the State attempted to introduce for the jury's consideration the record of this prior conviction. At the time of this trial the Court was advised that the Orange County conviction was on appeal and counsel for the Defendant urged upon this Court that such conviction could not be viewed as final until the Appellate Court had rendered its opinion. Out of what now appears to have been an over abundance of caution this Court sustained the objection of Defendant's counsel and did not permit the jury to consider the prior conviction in Orange County in reaching its advisory sentence. Subsequent appellate decisions have now made it clear that Trial Courts may permit advisory jurys to consider prior convictions as rendered in the Trial Courts without waiting the outcome of the appellate process. There is no way of knowing whether the fact of the Orange County conviction would have changed the jury's advisory sentence in this case; however, the fact of this prior conviction does appear to be a proper matter for this Court to consider in arriving at its sentence. There is no question that both the then existing charge of forcible carnal knowledge and aggravated battery qualify under subsection (5) (b).

In respect to whether the capital felony committed in this case was committed in such a manner as to bring it within the category of being "especially heinous, atrocious, or cruel", it appears to this Court and this Court so finds that the circumstances of this homicide fit within the definitions of

each of those terms. The record reflects that the Defendant told one of the State's witnesses that he had cut and removed the breasts of the victim while she was still living. In addition, the Defendant told the witness for the State that he had "cut the cunt out" of his victim while she was still living. The pain suffered by the victim prior to death must have been unspeakable. The mental agony that she suffered knowing for certain that she would be always less than a whole woman and probably knowing for certain that her death was imminent, must have been beyond comprehension. Such acts of the Defendant were atrocious which set this capital felony apart from the "norm" of capital felonies. Such actions were especially cruel as one cannot think of greater cruelty to be committed upon a woman. The word heinous being defined as "shockingly evil" is an especially appropriate characterization of the conduct of the Defendant. It might be possible that, absent medical examiner verification of such butchering (the victims body was found 24 months after her death and in an advanced state of deterioration) one should not put too great a reliance upon what the Defendant may have stated in braggadocio fashion to his young companion. However, all of the evidence before the Court confirms that the Defendant was speaking factually. The youthful companion testified that he observed the body of the victim shortly after her death and found it to be "blood spattered". The stabbing of the victim in the Orange County case indicated that the Defendant's use of a knife to inflict torturous cuts upon his victims was his modus operandi. The Defendant when asked by a friend as to why he did it that way stated, "man that's my style". This crime appears to this Court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim".

This Court has considered the other statutory categories of aggravating circumstances and finds them inapplicable.

This Court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation that would give rise to any such mitigating circumstances.

It is the finding and judgment of this Court that the Defendant be put to death in the manner and means provided by law (Section 922.10, F.S.). The Court informed the Defendant of his right to appeal from this sentence.

DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:

The Clerk of this Court shall file and record this judgment and sentence and shall prepare four certified copies of this record of sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The Defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the Defendant and the second certified copy of this conviction and sentence to the custody of the Department of Corrections to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this Court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings of the court since the mandate remanding this case to this Court for resentencing, and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this Court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4), F.S.), the Clerk of this Court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S.) and two copies thereof and, after certification by the sentencing Court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon counsel for the Defendant on appeal. After the Clerk has filed a transcript of record on

appeal with the Appellate Court, counsel for the Defendant on appeal shall file his brief within the time provided by appellate rules. The Clerk of this Court shall forthwith furnish the fourth copy of this judgment to the Defendant's counsel on appeal.

The Defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 4th day of June, 1981.

/S/ _____
ROBERT B. MCGREGOR
Circuit Judge

Attached and to be included in the appellate record is the Presentence Investigation Report prepared by the Department of Corrections and used, except for the stricken portions thereof, for the purpose of sentencing.

/S/ _____
ROBERT B. MCGREGOR
Judge

[Fingerprinting and certificate thereof, omitted in printing]

FLORIDA DEPARTMENT OF CORRECTIONS
PRESENTENCE INVESTIGATION
COUNTY SEMINOLE

[Caption omitted in printing]

I. OFFENSE

FIRST DEGREE MURDER (Sec. 782.04(1)(a) F.S.)

Information Resume: In the Circuit Court of the 18th Judicial Circuit of the State of Florida, for Seminole County, at the Spring term thereof, in the year, 1975, the Grand Jurors of the State of Florida: charge that on or about August 6, 1973, Joseph Robert Spaziano a/k/a "Crazy Joe," did unlawfully kill Laura Lynn Harberts, and said killing was from a premeditated design to effect the death of said Laura Lynn Harberts, contrary to Section 782.04(1)(a) Florida Statutes.

Court Appearances: On September 12, 1975, the Grand Jury returned an interim report and Indictment. The defendant was not present and State Attorney Abbott M. Herring advised the Court the defendant was incarcerated. Judge Williams ordered the Indictment filed and made public and ordered a Capias to be issued for the defendant's arrest.

On October 6, 1975, with neither the defendant nor his attorney present, Judge Cowart set trial for November 3, 1975, before Judge McGregor.

On October 17, 1975, the defendant's attorney entered an Application for Insolvency. Judge McGregor granted the motion and ordered the attorney not to exceed $250.00 for any expenses at this time.

On December 8, 1975, Judge McGregor continued the trial to January 19, 1976.

On January 20, 1976, the defendant appeared in Open Court with his attorney for trial. The Court selected a twelve (12) man jury and two (2) alternates and the trial began. The trial proceeded with Judge McGregor presiding. On January 23, 1976, the trial was concluded when the jury returned the *verdict of guilty* of First Degree Murder. Judge McGregor *adjudged the defendant guilty*, remanded

him to custody and continued the bifurcated portion of the trial until January 26, 1976.

On January 26, 1976, the defendant appeared in Open Court with his attorney. The jury, after due consideration, returned a recommended verdict of Life imprisonment as the advisory sentence. Judge McGregor ordered a Presentence Investigation, continued the defendant in custody, and set sentencing for March 15, 1976.

On March 8, 1976, the Court continued the sentencing date until April 22, 1976.

Circumstances: On August 22, 1973, human remains were discovered in an area west of State Road 431 in Altamonte Springs and subsequently reported to the Seminole County Sheriff's Department. Investigation determined that two (2) bodies were involved. A female body, the most complete, had both breasts and the vagina mutilated.

Subsequent investigation determined that a missing persons report had been given to the Orlando Police Department listing Laura Lynn Harberts, white female, age 18, as missing since August 5, 1973. The description of Harberts fit that of the mutilated body discovered in Altamonte Springs. On August 24, 1973, the body of Laura Lynn Harberts was identified by Dr. Carson S. Kindall through the use of dental charts.

On August 27, 1973, authorities with the Seminole County Sheriff's Department and Altamonte Springs Police Department, Lt. George Abbgy and Sgt. Martindale, ascertained that the victim had a date with an individual named Joe; that Joe belonged to a motorcycle group; and further, that he lived in Seminole County.

On February 9, 1974, Orange County authorities received information that Vanessa Dale Croft, white female, age 16, had been beaten, raped, and left for dead. She identified one (1) of her assailants as Joseph Spaziano. Due to the similarity of the offense, Spaziano became a prime suspect in the Altamonte Springs incident.

On October 10, 1974, Anthony Frank Dilisio, a friend of Spaziano's, was interviewed by Lt. Abbgy concerning the rape and assault of the 16 year old girl in Orange County. Dilisio implicated Spaziano by maintaining that Spaziano

talked freely of his assaults on female hitchhikers and had taken Dilisio to various areas where he had left the mutilated bodies.

Further investigation by the Seminole County Sheriff's Investigators resulted in the Grand Jury Indictment.

Defendant's Statement: Completely denies any knowledge or involvement. He indicates that Dilisio does not like him and wanted revenge. Freely discussed his past and was candid concerning same.

II. PRIOR ARRESTS AND CONVICTIONS:

DLE #: 01050185

Juvenile: None alleged nor determined.

Adult:

Date	*Place*	*Charge*	*Disposition*
7-10-63	PD, Rochester, N.Y.	Assault, 3rd	8-9-63 Elmira Reception Center—Suspended sentence—3 years probation—3-16-64 probation revoked—ERC Maximum 3 years

Apparently involved an altercation with a motorcycle gang who was bothering his girl friend. Police records failed to ascertain the actual circumstances with the aforementioned given to this investigator by the defendant.

Date	*Place*	*Charge*	*Disposition*
4-28-75	SO, Orlando, Fla.	Count I: Forcible Carnal Knowledge Count II: Aggravated Battery	8-13-75—Sentenced to life 8-13-75—5 years to run consecutive with sentence in Count I

On 2-9-74, a complaint was received from Vanessa Dale Croft, white female, age 16, who reported that she had been beaten and raped. The victim reported that after entering a pickup truck at the insistence of two (2) males, one (1) later identified as Joseph Spaziano, she was forced at knife

point to lay on the floor of the truck while they drove to a building, later identified as the "Outlaws" club house. Spaziano and the other white male, alleged to be John Allen Beeker, took the victim into the bedroom and took her clothes off. The subjects beat on her and then one of them forced her to have intercourse while the other inserted his penis into her mouth. She was later taken to the living room of the house and forced on her hands and knees while one of them again had intercourse with her from the rear while the other watched. The twosome then took the victim back to the truck and drove the vehicle a considerable distance, stopping at a place alongside the road where there were high weeds. She was then assaulted again with Spaziano then placing her belt around her neck and she was choked unconscious, beat, and cut about the face and neck. She lost consciousness and when she finally regained her consciousness, dragged herself to the road and was assisted by a passing motorist.

Doctors at Florida Hospital reported multiple stab wounds around her eyes and neck. She was apparently left for dead by Spaziano and the other male. The other male was never positively identified. Joseph Robert Spaziano was identified by the victim after observing numerous pictures.

III. SOCIAL HISTORY: Birthplace: Rochester, New York

Family: Father, Christopher Spaziano, Rochester, New York, is retired due to poor health. He had functioned as a yard superintendent for John C. Pikes, Rochester, New York. His mother, Rose Spaziano, resides with her husband, defendant's father, and functions as an Avon Saleslady. The defendant is the second oldest of seven (7) children. Purportedly, he set himself up as guardian for his sister, Barbara, and became overly protective. Barbara is very much interested in the welfare of her brother and indicates the entire family is concerned and quite upset. She indicated the defendant always got along well with all the family members, except for the normal amount of disagreements between father and son. No other immediate family members have had any difficulties with law enforcement.

The defendant lived with his family in Rochester until age twenty-four (24). He reported that at age 15 he and his cousin's husband decided to leave town and go to California and they ended up in New Jersey where they were labeled *runaways* and returned to their home. At age 20, he was struck by an automobile as a pedestrian and was hospitalized for a long period of time. He suffered severe head injuries and the left side of his face was paralyzed for a while. He voluntarily admitted himself to the Rochester State Hospital for evaluation as a result of the head injuries, complaining of mild depression and according to family members, exhibiting a slow personality change. Following his release from the hospital, he joined a motorcycle club in Rochester known as the "Hackers" which later became affiliated with Hells Angel's Motorcycle Club. The Hells Angels were dealing heavily in heroin and he decided to leave because he did not believe in the use of heroin. This belief was the result of a "bad trip" he took on his only use several years before. He reported his decision to leave Hells Angels resulted in the club members hanging him with handcuffs over a pipe in the basement of their club house where he was kept for three (3) hours. During this time, different members of the club burned him with cigarettes and whipped him.

At this time, he was living with his girl friend, Linda Deprey, in Rochester, having told her parents they were married. Linda's parents had race horses in Florida and the defendant left with Linda to come to Hollywood and live with her parents in 1969. They were subsequently married and eventually moved to Seminole County.

Following a separation and divorce, the defendant began going with Darcy Fauss. They lived together for a while in Orlando and left the Orlando area circa February, 1974, when he discovered that the law enforcement authorities were looking for him with a warrant. They traveled north to Rochester, New York. They arrived in New York on February 12, 1974, and about three (3) weeks later, the defendant went to Pennsylvania for a week, came back, and then left again for Pennsylvania. When he left this time, Darcy went to Florida and left the baby (hers) and later

flew back to Pittsburgh to meet with the defendant. At that time, he was in Butler, Pennsylvania, returned to St. Petersburg and picked up Darcy's furniture, returned to Pennsylvania, but the club house there had been raided so they went on north to Youngstown, Ohio, where they stayed a week.

Education: Completed the 8th grade in Rochester, New York. Reportedly repeated the 4th and 6th grades and subsequently was attending special classes for the next two (2) years. The defendant indicated he often skipped school and was involved in many fights while attending. He was last in attendance at Madison High School in March, 1961, when he was assigned to the school work program, which is designed for students having an IQ between 76 and 89 (dull normal range). He dropped out of school at this time in that all of his friends were leaving, obtaining jobs and driving cars.

Marital: Married Linda Deprey on February 7, 1970, in Broward County, Florida. They were divorced on August 15, 1972, with one (1) child, Mary Noel Spaziano, borne to this union and is currently residing with her mother. At the time of the divorce, the court set an amount of child support for the defendant to pay, but at that time, Linda declined the child support because she believed she wanted to break away completely from the defendant. The defendant has visitation rights which he has exercised since their divorce. He is described as a very attentive father and he thought "the sun rose and set on his daughter." Linda indicates that while she was married to the defendant, he was not a member of the "Outlaw" motorcycle club, but joined after their divorce.

Residence: The St. Petersburg residence is that of Darcy Fauss, the defendant's fiancee'. Previously lived with Linda in a trailer park located on State Road 476 next to Bel-Aire Homes. After a short period of time, they bought a home located at 404 Georgia Avenue, Altamonte Springs. Linda is still the owner of the home and it is rented to tenants. Previously the defendant experienced a somewhat nomadic existence following his departure from the familial situation.

Religion: Professes Catholic beliefs, non-attender.

Interests and Activities: He indicates he has always been interested in motorcycles. He reported he belonged to the motorcycle clubs in Rochester, New York, and joined the "Outlaw" motorcycle club in Broward County. His reference to "motorcycle club' is of particular note. He indicated that motorcycles are in his blood and he enjoys riding them and joined the motorcycle clubs for social activity and the *close brotherhood relationship* that exists. In a motorcycle club, it is like a family wherein all are brothers. They trust one another, defend each other, support each other and if there is trouble, and should one (1) of them get caught, if not even guilty, that individual will take the "rap" for the rest. He indicated the club shares everything they have with their fellow brothers. In many ways, he describes it as better than being with his own family. The motorcycle clubs have a lengthy history and have a notorious reputation. The defendant indicates that all of the adverse publicity has been sensationalized by the news media and is in essence a falsehood.

The defendant indicates he was never interested in reading, but for a long period of time was interested in drawing. He smokes tobacco moderately, drinks moderately and his use of drugs has been limited to marijuana except for one (1) incident with "acid" many years ago.

Military: None

Health:

Physical: Age 35; white male; dark complexion; black hair; brown eyes; 5'5" tall; weighs approximately 125 pounds, with a slender body build. Scars and tattoos consist of a Geisha Girl figure on his upper right arm; Lion-Tiger lower left arm; top of Indian totem pole on upper left arm; lower left arm word, "Outlaws."

Mental: He was involved in a rather serious accident when he was run over by an automobile as a pedestrian in Rochester, New York, at the age of 20. He was hositalized for a considerable length of time and spent one (1) year convalescing. The defendant entered the Rochester State Mental Hospital for examination on December 30, 1967, as a result of injuries from this automobile accident. This was

a voluntary admission and he was taken to the hospital by his parents.

The defendant was given the Minnesota Multiphasic Personality Inventory which measures personality traits, but with the preface that the measurement of personality traits is still in an embryonic stage. Many measures of personality traits have questionable validity. This test is not free of these weaknesses; however, some have been adopted because it is the best that is available for our purposes. This is a computerized scoring and, therefore, eliminates a great deal of the unreliability. Same indicates that this individual tends to give socially approved answers regarding self-control and moral values, is touchy, overly responsive to opinions of others, inclined to blame others' for his own difficulties and is somewhat rebellious or nonconformance. He avoids close personal ties, is dissatisfied with family or social life and is probably energetic and enthusiastic. He has varied interests, has a combination of practical and theological interests. He has a normal male interest pattern for work, hobbies, etc. and views life with average mixture of optimism and pessimism. He is probably not a worrier, tends to be relaxed regarding responsibilities and probably is socially outgoing and gregarious. He indicates few somatic complaints and has little concern about bodily health.

Employment: Same has been relatively unstable. He has worked several years as a mason's apprentice and while in Orlando, worked as a self-employed house painter and mason. He was unable to give specific dates of employment and verification was not possible.

Economic Status: Nothing of significance.

Personal Statements:

William R. Sharp, Assistant State Attorney, Orange County, Florida, reported, "I feel most strongly this defendant is a savage and violent person and constitutes an *extreme threat* to our community. It is my sincere belief that this defendant will not be rehabilitated by imprisonment."

Detective Joann Hardee, Orange County Sheriff's Department, stated, "I believe Joseph Spaziano should get the death penalty or a Life sentence consecutive with the Life

sentence and five (5) year sentence received in the Orange County Rape and Aggravated Assault convictions.

Thomas J. Lauricella, Investigator, Monroe County District Attorney Office, New York, reported he has known the defendant since 1965 because of his involvement with local police agencies. He further reported that the defendant is wanted for questioning in connection with four (4) unsolved homicides occurring in the Monroe County area during the past several years.

Jeff Kumorek, Gang Crime Section, Chicago Police, stated he knew of the subject's arrests there and also knew of four (4) homicides and three (3) bombings in which the subject is a suspect while a member of the "Outlaw" gang in Chicago.

Christopher Spaziano, father, stated he thought a change occurred after the serious accident. He stated his son's face was partially paralyzed and the eye and left side of his face was twisted as a result. He believed that the defendant was very conscious of it and it was over a year before he recovered. Many of his friends made quite a bit of fun of him at this time and the defendant began making funny faces and his father suggests that this was the time they began to call him "Crazy Joe." He further stated his son had been away from home for seven (7) or eight (8) years, but has always maintained close contact with the family.

Rose Spaziano, mother, stated her son had worked since he was 13 years of age. She said he did okay in school, but did not finish because his friends were all quitting. She also stated her son was a poor judge of character and if someone was nice to him, he would do anything for them. She stated she could not believe any Rape charge; that he always had more of a problem in keeping them (girls) away than getting them.

Linda Deprey Harrell, ex-wife, was somewhat reluctant to comment about her marriage to the defendant. She stated the defendant had experienced a serious injury in 1968 when he was struck by a car and he could not walk for some time and the defendant's mother stated his personality was never the same afterwards. In reference to her marriage, she said he was the boss and had his way. She further indi-

cated that the defendant had a good outgoing personality, but could not stand pressure and became very nervous when pressure was placed on him. She commented that the defendant was a good father to their child and she finds it hard to believe that he is capable of murder. She reported that while in New York she witnessed the defendant stop fellow gang members from beating a man to death and that this action by the defendant resulted in his being beaten up by the fellow gang members. She further remarked she witnessed another good deed by the defendant when he intervened when fellow gang members were attempting to rape a female. She stated, "If you told me he committed a robbery or something, I would believe it, but not a rape or murder. If he killed someone, I think it was an accident."

Darcy Fauss, defendant's fiancee', reported she knew the defendant for two and one-half (2-½) years before she started going with him in November, 1973. She indicated this was about two (2) months after the defendant became an "Outlaw." She stated they lived together beginning at this time, November, 1973, in a "split the rent," each do their own thing arrangement, for two (2) months and then they just went with each other. She advised she left Orlando with him in February, 1974, and spent the rest of 1974 until Spaziano's arrest in April, 1975, in Chicago, traveling and living with him.

V. COURT OFFICIAL'S STATEMENTS:

Prosecutor: Attached please find a typewritten statement regarding same.

Defense Attorney: No response has been received.

Law Enforcement: Lt. George Abbgy, Seminole County Sheriff's Department, stated, "During the course of the investigation, many things came up concerning the defendant. Even many of his close friends considered him to have a depraved mind and that even though they were friends, they were very aware of him and indicated they were afraid of him. Many of his friends indicated the defendant's nickname, 'Crazy Joe', was not because he was crazy, but because of the things he did. He had bragged to one of the main witnesses in this murder case of all the girls he had killed and maimed and he believes that there are many bod-

ies that they have yet to recover. Certainly he should be sentenced accordingly.

VI. ANALYSIS

Before the Court is a 35 year old, divorced, white male, who was found guilty by jury trial of First Degree Murder, with a recommended sentence of Life imprisonment.

He is admittedly a member of a motorcycle gang which, whether true or not, carries a very poor reputation within the Seminole and Orange counties area. Prior to his conviction in Seminole County, he was convicted of Rape in Orange County, and sentenced to Life imprisonment, plus five (5) years for Aggravated Battery. The defendant negates any direct involvement, but seems ready to accept the consequences. He talks freely, candidly, and described his activities with the motorcyle gang as a pleasurable experience. He was married to an attractive, well-educated individual with this union resulting in one (1) child and ending in divorce. Although child support was not requested, the defendant does assist occasionally and has visitation rights. His ex-wife still communicates with the defendant and seems to be uniquely interested in his welfare. His family members have stuck close by him and are very supportive.

I hereby certify the above is true and correct to the best of my knowledge and belief.

FLORIDA STATUTE NOS. F.S. 782.04(1)(a)
MINIMUM PENALTY : Life
MAXIMUM PENALTY : Death

DEPARTMENT OF CORRECTIONS
Probation and Parole Services
By: /s/ _____
E. S. BEDELL, SUPERVISOR

ESB:gh
Date Dictated: 5-19-81
Date Typed: 5-21-81

No Confidential Section

The Presentence Investigation is not a public record and is available only to those persons as specified in *Rule 3.712* of the Florida Rules of Criminal Procedure.

CONFIDENTIAL

Bedell Date 4-30-81

To: Circuit Administrator
Department of Corrections
Probation and Parole Services
115 N. Oak Avenue
Sanford, Florida 32771

This is for your use only in your investigation of the named defendant and to be disclosed only through your report to the Judge having jurisdiction of the defendant or to the Pardon Board or the Parole Commission, when appropriate.

FROM: STATE ATTORNEY
STATE *vs.* Joseph Robert Spaziano, a/k/a Crazy Joe
CHARGE 1st Degree Murder
INFORMATION NO. 75-430-CFA

The Department of Corrections, Probation and Parole Services, is conducting a presentence investigation on the above named. My synopsis of the facts and comments regarding this case and the defendant is as follows:

I recommend that the defendant Joseph Robert Spaziano a/k/a "Crazy Joe" be sentenced to death because the existence of two aggravating circumstances have been proved beyond a reasonable doubt and there are no statutary or nonstatutary mitigating circumstances that extenuate or mitigate the atrocity of this lust murder.

Although the jury recommended the defendant be sentenced to life, that recommendation should be rejected because the compelling reason that there are no mitigating circumstances, and because the homicide of Laura Lynn Harberts was especially heinous, atrocious or cruel. The jury did not behave reasonably when it recommended life for this heinous murderer when there were no mitigating circumstances extenuating or mitigating this heinous murder. Additionally, the sentencing jury did not have the benefit of the proof of the Orange county convictions of felonies done to Vanessa Dale Croft. With regard to the aggravating circumstances that this murder was especially heinous,

atrocious and cruel, the facts show that this murder was a conscienceless or pitiless crime that was unnecessarily torturous to the young woman Laura Lynn Harberts. The defendant said he had raped, stabbed, cut the breasts off and cut the cunt out of Laura. Laura experienced great physical and mental pain and suffering, because according to the defendant he raped her and then tortured her. One of the ways he tortured Laura was he cut her vagina out and showed it to her. It is unmaginable how such piquerism could be accomplished by a human being. Laura's expectation of doom was no doubt unmeasurable as she endured the butchery wrought on her by the defendant who sought to possess and dominate her body after death and thereafter to display braggingly his handiwork to another person, a young boy named Anthony Frank Dilisio.

Additionally, after this butchery on Laura Lynn Harberts, the defendant on 9 February 1974 engaged in a course of criminal conduct that in Case Number 75-1305 out of Orange County resulted in the defendant being convicted of a felony involving the use or threat of violence. The defendant forcibly placed his penis into the mouth of Vanessa Dale Croft and lacerated the eyes of Vanessa Dale Croft. There are two striking features of the character analysis of the defendant occasioned by this Orange County conviction. The first is that after the savagery on Laura Lynn Harberts during the period of time between August 5-16, 1973 the defendant continued his depraved venturings and savaged another young woman. The second feature is that defendant also was responsible for mutilation of another living person—this time the eyes of Vanessa Dale Croft. Fortunately, Venessa only lost a majority of the vision of her left eye whereas Laura lost her life. Laura became one of the defendant's girls in the finalty of time and space. The bestiality shown in the heinous murder of Laura and the mutilating sex act of Vanessa demonstrate convincingly that there really can only be one punishment which will adequately measure up to the monstrous evil perpetuated by this defendant in the dark lamentable catalogue of human crime and that is DEATH by electrocution.

/s/ _____

ASSISTANT STATE ATTORNEY

Supreme Court of Florida

No. 50,250

JOSEPH ROBERT SPAZIANO, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

[May 26, 1983]

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant following a resentencing hearing ordered by this Court in *Spaziano* v. *State*, 393 So. 2d 1119 (Fla.), *cert. denied*, 454 U.S. 1037 (1981). We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm.

Appellant was convicted in 1976 of the first-degree murder of Laura Harberts. The testimony at appellant's trial revealed that appellant "often bragged about the girls he had mutilated and killed," and that on one occasion he had taken two individuals to a dump site to show them two corpses to substantiate his claim of responsibility for the murders. One of the individuals accompanying appellant to the dump site later directed police officers to the bodies, one of which was identified through the use of dental records as being that of Miss Harberts.

The jury recommended that appellant be sentenced to life imprisonment. The trial judge, at the initial sentencing proceeding, ordered and considered a presentence investigation report. He imposed the death sentence, finding two aggravating circumstances: (1) that the offense was committed in a manner which was heinous, atrocious, and cruel; and (2) that the defendant was previously convicted of felonies involving the use or threat of violence to the person. These felony convictions were listed in the presentence investigation report, and included two convictions discussed

in a confidential section of the report which the appellant was not given the opportunity to explain or deny.

On appeal, we affirmed appellant's conviction, but remanded for resentencing to comply with the dictates of *Gardner v. Florida*, 430 U.S. 349 (1977), which was decided after the trial of this case.

Following our remand, the trial judge ordered a new presentence investigation report and conducted a hearing to provide appellant the opportunity to respond to the report. Following this sentencing hearing, the trial judge reimposed the death sentence, once again finding two aggravating and no mitigating circumstances. Appellant raises five asserted errors in the resentencing proceedings.

Appellant first contends that at the resentencing hearing the trial judge improperly allowed the state to introduce new evidence in support of an aggravating circumstance. In the original sentencing phase, the trial judge rejected the state's proffer of evidence to the jury which established the appellant's conviction of forcible carnal knowledge and aggravated battery because the conviction was then on appeal. This information was also contained in the original presentence investigation report. Upon remand, because this conviction was affirmed on appeal, the trial judge did consider it as an aggravating circumstance in the resentencing proceedings. Appellant contends that the consideration of this conviction improperly expanded the scope of the remand in violation of *Songer* v. *State*, 365 So. 2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979), and *Dougan v. State*, 398 So. 2d 439 (Fla.), *cert. denied*, 454 U.S. 882 (1981), and in effect allowed the state to reopen its case to prove additional aggravating factors in the sentencing phase in violation of the double jeopardy rule set out in *Bullington* v. *Missouri*, 451 U.S. 430 (1981). We reject this contention.

Neither *Songer* nor *Dougan* is applicable here. In each case this Court rejected appellant's attempt to expand the *Gardner* remand proceedings beyond the limited purpose of explaining or denying the contents of the presentence investigation report by either calling character witnesses whose testimony was not relevant to the report or by at-

tempting to create a full-blown sentencing proceeding. The conviction considered by the court in the resentencing proceedings was in fact contained in the original presentence investigation report and the trial judge could have properly considered this conviction during the original sentencing phase. In *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981), we held that a trial judge could take into account convictions which were on appeal at the time of sentencing. Not only could the trial judge have considered the appellant's conviction in the original proceeding, but the information of the conviction as an aggravating circumstance was previously before the court. This circumstance does not expand the scope of the remand by allowing the state to introduce new evidence. The evidence clearly had been submitted in the initial proceedings. We hold that the trial judge may properly apply the law and is not bound in the remand proceedings by a prior legal error. (We note *Peek* was decided subsequent to the first trial.) There was no *Bullington* double jeopardy violation and appellant was given a full opportunity to explain or deny the conviction in the resentencing process.

Appellant secondly contends that the trial court erred in considering the appellant's previous convictions for felonies involving violence, when such convictions were not presented to the jury for consideration in the original sentencing proceedings. According to the appellant, the trial judge's actions were violative of section 921.141, Florida Statutes (1973), Florida's death penalty provision, and the eighth and fourteenth amendments of the United States Constitution. The appellant's contention is without merit. In *White* v. *State*, 403 So. 2d 331, 339 (Fla. 1981), we upheld a sentence of death imposed by the trial judge in the face of the jury's recommendation of life where the trial judge "noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." Because the aggravating circumstances outweighed any possible mitigating circumstances, the trial judge concluded that the death sentence was ap-

propriate and we affirmed. We reach the same conclusion in this case.

Third, appellant contends that the trial court erred in overriding the jury's recommendation of life because the aggravating circumstances considered by the trial judge were improper. We have already discussed and approved the aggravating circumstance of a prior conviction of a violent felony. We also conclude that the other aggravating circumstance, that the murder was heinous, atrocious, and cruel, was properly determined by the trial judge to be applicable to this case. One of the individuals who accompanied the appellant to the dump site to view the two corpses testified that the bodies were covered with "quite a bit" of blood and he could see cuts on the breasts, stomach, and chest. The witness further testified that appellant told him of how he tortured the victim with his knife while she was still living. This testimony of appellant's treatment of his victim clearly places his acts within the category of "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" so as to set this "crime apart from the norm of capital felonies." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, including the prior conviction of a violent felony which the jury did not have an opportunity to consider, meets the clear and convincing test to allow override of the jury's recommendation in accordance with previous decisions of this Court. *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975).

Fourth, the appellant contends that the imposition of the death sentence following a jury recommendation of life imprisonment violates the double jeopardy protections of the fifth amendment of the United States Constitution and conflicts with *Bullington v. Missouri*, 451 U.S. 430 (1981). *Bullington* is not applicable to this case. The Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing, as was the Missouri procedure in *Bullington*. More important, however, this is not a case in which the appellant has been granted a new trial and has been resentenced by a new jury. This Court has al-

ready decided the double jeopardy issue raised by appellant. In *Douglas v. State*, 373 So. 2d 895 (Fla. 1979), it was argued that "a jury's life recommendation is tantamount to a judgment of acquittal of a crime for which a death sentence is appropriate, because it reflects either an absence of proven aggravating circumstances or an absence of proof that the aggravating circumstances outweigh any mitigating circumstances." *Id.* at 896. We rejected this argument in *Douglas* for two reasons. First, the jury's function under the Florida death penalty statute is advisory only. *See Proffitt v. Florida*, 428 U.S. 242 (1976). Second, allowing the jury's recommendation to be binding would violate *Furman v. Georgia*, 408 U.S. 238 (1972).

Fifth, the appellant contends that he was denied due process because the resentencing proceedings were not assigned to a new judge. The trial judge denied appellant's motion for substitution of judge in the resentencing proceedings. Appellant contends that a sentencing judge who has heard and relied upon improper evidence in imposing a death sentence cannot without difficulty consider proper factors on resentencing without also considering the improper evidence. To adopt this assertion would mean that whenever a defendant must be resentenced in any proceeding, a new judge must be assigned. We note that appellant offers no evidence of bias or prejudice on the part of the sentencing judge other than the fact that he was the trial judge in this case. In *Douglas* v. *Wainwright*, 521 F. Supp. 790 (M.D. Fla. 1981), the court rejected a similar argument, finding that the sentencing judge's statements showed that improper convictions were not used against the defendant in sentencing. The court in *Douglas* followed *United States v. Gaither*, 503 F.2d 452 (5th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975), which held that it is not inherently impossible for a court to disclaim consideration of an improper conviction in sentencing while still having knowledge of the conviction. We conclude that the evidence in the instant case clearly indicates that the sentencing judge properly disregarded the information in the original presentence investigation report in resentencing appellant.

For the reasons expressed, we affirm the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur
McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting

I dissent on the sentence of death primarily because the jury recommended life. I see no compelling reason to override that recommendation. The jury viewed this defendant and listened to the details of this homicide. They could conclude that a life sentence is appropriate. After all, Spaziano was known as "Crazy Joe." When he was 20 years old he was involved in a serious accident. Ever since then he has not been "normal." The jury could well find that he was entitled to the statutory mental mitigating factors. The bizarre and gross nature of this homicide is supportive of that finding. Certainly on factual disputes the trial judge, and we on review, should yield any contrary beliefs to that of the jury. I would remand with instructions to impose a life sentence without eligibility for parole for twenty-five years.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, JULY 13, 1983

Case No. 50,250
Circuit Court Case No. 75-430-CFA
(Seminole)

JOSEPH ROBERT SPAZIANO,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur
McDONALD, J., Dissents

[JURAT OMITTED IN PRINTING]

Supreme Court of the United States

No. 83-5596

JOSEPH ROBERT SPAZIANO,
PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted: and that the petition for writ of certiorari be, and the same is hereby, granted.

January 9, 1984